

**TAB 3**

95-216

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

IN RE INTEK GLOBAL CORPORATION : Civil Action  
SHAREHOLDERS LITIGATION : No. 17207  
:

-----  
Chancery Courtroom No. 106  
Daniel L. Herrmann Courthouse  
Wilmington, Delaware  
Monday, April 24, 2000  
2:01 p.m.  
-----

BEFORE: HON. LEO E. STRINE, JR., Vice Chancellor.

-----  
SETTLEMENT HEARING  
-----

CHANCERY COURT REPORTERS  
135 Daniel L. Herrmann Courthouse  
Wilmington, Delaware 19801  
(302) 577-2447

1 APPEARANCES: NORMAN M. MONHAIT, ESQ.  
Rosenthal, Monhait, Gross & Goddess  
2 -and-  
STEVEN G. SCHULMAN, ESQ.  
3 of the New York Bar  
Milberg Weiss Bershad Hynes & Lerach  
4 for the Plaintiffs

5 DANIEL A. DREISBACH, ESQ.  
Richards, Layton & Finger  
6 for Defendants Robert B. Kelly,  
Eli M. Noam, Howard Frank,  
7 Robert J. Shiver, Steven L.  
Wasserman, John Wareham and  
8 Intek Global Corporation

9 KENNETH J. NACHBAR, ESQ.  
Morris, Nichols, Arsht & Tunnell  
10 -and-  
STEPHEN A. RADIN, ESQ.  
11 of the New York Bar  
Weil, Gotshal & Manges  
12 for Defendant Securicor PLC

13 - - -

14

15

16

17

18

19

20

21

22

23

24

1 THE COURT: Good afternoon,  
2 Mr. Nachbar.

3 MR. NACHBAR: Good afternoon. This  
4 is the time for the settlement hearing in In Re Intek  
5 Global Corporation Shareholders Litigation. Before  
6 we begin, I just wanted to introduce my cocounsel to  
7 the Court, Stephen Radin, of Weil, Gotshal & Manges.

8 THE COURT: Good afternoon.

9 MR. NACHBAR: Thank you, Your Honor.

10 THE COURT: Mr. Monhait.

11 MR. MONHAIT: I have a similar  
12 introduction and a motion for pro hac vice admission.  
13 I'm pleased to move the admission, for purposes of  
14 these proceedings, of Steven Schulman of Milberg  
15 Weiss Bershad Hynes & Lerach, lead counsel for the  
16 plaintiffs in this action. Mr. Schulman will be  
17 making the presentation in support of the settlement.

18 THE COURT: Good. Good afternoon,  
19 Mr. Schulman.

20 MR. SCHULMAN: Good afternoon.

21 THE COURT: I've signed the order.

22 MR. MONHAIT: Thank you.

23 MR. SCHULMAN: Your Honor, I'm happy  
24 to present, today, the settlement of a class action

1 arising out of the majority's acquisition of the then  
2 minority shares of a company known as Intek Global.  
3 The original complaint had alleged unfair dealing and  
4 unfair price under Weinberger, and set out facts  
5 indicating that the company's value, as we alleged,  
6 was greater than the price being paid. The amended  
7 complaint thereafter incorporated a series of  
8 disclosure claims directed at the statements and  
9 representations that had appeared in the tender offer  
10 documents.

11 After a hearing was scheduled on a  
12 preliminary injunction and discovery had commenced in  
13 a highly compressed timetable, the parties negotiated  
14 a nearly 10 percent improvement in the acquisition  
15 price, amounting to approximately \$4.3 million on a  
16 transaction in the \$50 million range, that being for  
17 the public shares.

18 We are here to seek an order that  
19 contains four elements: Certification of the class  
20 here in the context of a settlement; approval of the  
21 settlement under the standards of Rule 23; granting  
22 plaintiffs' counsels' request, in the event the  
23 settlement is approved, for an award of attorneys'  
24 fees and expenses in an amount set forth in the

1 papers; and from that sum, to the extent it is  
2 allowed, permission to make what are termed special  
3 payments of \$10,000 to each of the four named  
4 plaintiffs in the first-filed Sequeira action, again  
5 to be paid out of any court-awarded attorneys' fees,  
6 with no diminution to any member of the class.

7 Pursuant to the Court's order and  
8 following the execution of the settlement  
9 stipulation, notice has been duly provided to Intek's  
10 record and beneficial holders. And I'm happy to  
11 report that to the best of my knowledge, no  
12 objections have been filed to any aspect of the  
13 relief sought today. The courtroom appears to be  
14 absent of any persons who might be an objector.

15 If I may briefly sketch the factual  
16 background? Intek was, and presumably still is, a  
17 development-stage company which is engaged in the  
18 research and development of various forms of wireless  
19 communication technology, as well as the manufacture  
20 and sale of products and services related thereto.

21 Through a series of transactions in  
22 the mid-to-late nineties, an English company known as  
23 Securicor, which is in the same approximate industry,  
24 acquired 61.3 percent of the stock and was clearly a

1 majority and controlling shareholder, subject to  
2 duties of entire fairness in connection with a buyout  
3 transaction.

4 In that regard, in January of 1999,  
5 Securicor publicly announced it was reviewing its  
6 strategic options with regard its investments in  
7 Intek, which at that time included not only the stock  
8 portion but as well, \$70 million in debt financing  
9 that were necessary to the company's achievement of  
10 its plans, as it was then generating no positive cash  
11 flow.

12 The Intek Global company, at the  
13 behest of Securicor, formed an independent committee,  
14 consisting of four and then two individuals. And  
15 this committee then obtained the services of Bear  
16 Stearns, as well as outside legal representation.

17 There was a series of negotiations  
18 sketched out in the tender offer materials, a series  
19 of bids, counterbids, a rather elaborate exchange of  
20 information, all of which, of course, was not known  
21 to the plaintiffs when the lawsuit commenced but was  
22 revealed subsequently in the tender offer materials,  
23 ultimately resulting in an agreement by Securicor and  
24 Intek by which the minority shares would be

1 repurchased at \$2.75 a share in a tender offer, to be  
2 followed by a second-step merger once the tender  
3 offer was concluded.

4 The significance of the tender offer  
5 device, of course, was that it put the transaction on  
6 a very fast track to completion, so that plaintiffs,  
7 if they would seek relief against it, would also have  
8 to move in a correspondingly expedited fashion.

9 Upon the announcement of the  
10 transaction, this lawsuit was commenced. And the --  
11 shortly thereafter, the offer, which had been  
12 announced on June 7th but in effect was the end  
13 result of a negotiating process, was accepted. The  
14 merger agreement was signed and the tender offer  
15 commenced.

16 It's worth noting, particularly for  
17 the special payment portion, that both the complaint  
18 and the amended complaint reflected substantial input  
19 from the plaintiffs that arose from their  
20 communications with the company's officers over a  
21 period of time. They are themselves sophisticated  
22 investors. They, themselves, directly or through  
23 associates spoke for as much as 10 percent of the  
24 public float and were very concerned about the



1 transaction; reached out, found the Milberg Weiss  
2 firm, brought us into this transaction when they  
3 suspected there might be a transaction in the offing  
4 and, when the transaction occurred, authorized the  
5 filing of the suit and gave us substantial  
6 information with which to proceed.

7 THE COURT: They were sort of copious  
8 note takers during these conversations with  
9 management?

10 MR. SCHULMAN: That's how they had  
11 described it.

12 THE COURT: Somebody asked the  
13 questions and another person sat down, furiously  
14 writing it down.

15 MR. SCHULMAN: Without waiving any  
16 privilege, I've seen the notes myself. The end  
17 result of that was reflected in the opening  
18 complaint. It's a complaint that we believe had  
19 merit in the pleading sense and, therefore, satisfies  
20 the predicates for a settlement, as well as a fee  
21 application.

22 Promptly after filing the amended  
23 complaint, we moved for expedited discovery. We did  
24 so on the basis that we believed we had set forth

1 quite specific allegations as to alleged  
2 nondisclosures. The details are set forth in the  
3 papers.

4 In general, they related to allegedly  
5 valuable contracts that the company had entered into,  
6 that we claimed were, in effect, not specifically  
7 disclosed; that the company had embarked upon  
8 innovative new technologies and broad-band technology  
9 and VHF technology, which would give it substantial  
10 value, that was not specifically disclosed or, we  
11 claimed, reflected it had recently entered into what  
12 we claimed was a very valuable contract with the NRTC  
13 to sell its products, and had been awarded a very  
14 substantial numbers of licenses in this VHF frequency  
15 by the FCC in their auction only at the end of 1998.

16 The Court, in scheduling a  
17 preliminary injunction proceeding on a conference  
18 call in which we all participated in this room, did  
19 specifically note the specificity of these  
20 allegations, obviously without predetermining their  
21 merit.

22 THE COURT: I think -- didn't I say  
23 these frivolous claims were raised very specifically?

24 MR. SCHULMAN: I don't recall that,

1 but if the Court discerned there was some risk in the  
2 case, then the rest of my analysis follows logically.

3 The parties then embarked on a rather  
4 intensive two-week planned-out period of multiple  
5 depositions, document production. Each of the four  
6 plaintiffs in the Sequeira action were noticed for  
7 depositions. Their documents were sought. In this  
8 period, we retained two experts, an industry expert;  
9 a sophisticated financial expert, as well. So we  
10 were doing a lot of work. Milberg Weiss, as the sole  
11 lead counsel, mobilized this team to take discovery  
12 and brief and defend depositions on the same track.

13 I think an important factor that I  
14 would like to bring out, because it goes to the  
15 difficulty of the case, was that when Securicor  
16 announced it had entered into -- actually entered  
17 into negotiations, negotiating an offer of 2.75,  
18 which was really the end result of the process, it  
19 stated, "This is it. We are not going any further."

20 I think that is quite unusual, and I  
21 think it underscores when you deal with large  
22 companies like this, in transactions like this, which  
23 reflected an end result of a process with the special  
24 committee, when the plaintiffs shareholders come in

1 and they are not part of the back and forth between  
2 the company and the acquiror, it is very difficult to  
3 get them to move on the price.

4 Mr. Radin I think would confirm that  
5 at least as far as the initial discussions were  
6 concerned, I said candidly we would not settle this  
7 case on any terms other than an increase in the  
8 price, even though that was far in excess of the  
9 relief we could have gotten on preliminary  
10 injunction. He was very firm that his client would  
11 not increase the price.

12 This is where the discussions stayed  
13 for some period at the beginning. But as the  
14 proceedings heated up, and on the backdrop of what we  
15 were developing and the pressures of the PI  
16 proceedings, we did get into further settlement  
17 negotiations, and this did cause a breakthrough in  
18 which Securicor, the buyer, did finally indicate  
19 flexibility on the price.

20 So just as there had been between the  
21 special committee, as reported in the tender offer  
22 materials, and Securicor, we engaged in a series of  
23 offer and counteroffer, which led to, ultimately, an  
24 agreement that \$2.75 per share price to the public

1 would be increased by 26-and-a-quarter cents per  
2 share, amounting to an approximate 9-and-a-half  
3 percent increase, rounding out to about a \$4.3  
4 million increase.

5 It was also agreed that the  
6 company -- companies, together, would issue  
7 substantial supplemental disclosures. In particular,  
8 a supplement did then issue that gave very great  
9 specificity on the WorldTeam expression of interest,  
10 which turned out not to have been a significantly  
11 credible matter but would be material to  
12 shareholders, we claimed, in assessing their  
13 strategic options.

14 And there was a lengthy discussion of  
15 the O'Hara report, which in the middle of  
16 negotiations had brought about a reduction in Intek's  
17 projected performance over a five-year period,  
18 raising suspicions on our part that the numbers were  
19 being changed in the middle of negotiations to  
20 achieve a predisposed result.

21 But their evidence showed that the  
22 O'Hara report was prepared independently by a  
23 management person. It was gone over by senior  
24 management. It was gone over by Bear Stearns and by

1 the special committee. And their position was that  
2 this reflected a credible midcourse correction that  
3 was unrelated to achieving any predisposed price. It  
4 was based on that change that the special committee,  
5 which had been resistant to 2.75 per share, came  
6 around to the view that it would accept it. In the  
7 face of that report and the company's declining  
8 projections, we still were able to extract not only  
9 disclosure about it, but a higher price from the  
10 buyer.

11 THE COURT: Where in the record is  
12 the supplemental disclosure?

13 MR. SCHULMAN: I believe it was  
14 marked -- it should have been marked as an exhibit.  
15 If not, we could proffer it to the Court. If I may,  
16 briefly, Your Honor? I don't have the exhibit  
17 number.

18 What I think happened was that we  
19 completed the discovery on July 7 and 8, and the  
20 supplemental disclosures came out later in the month  
21 of July. So in fact, the document was probably not  
22 placed into the record. I could cure that omission  
23 promptly, Your Honor.

24 THE COURT: If you could cure it so I

1 can -- I should have -- I should have called you all  
2 about it, because when I -- I reviewed the record  
3 last week, I didn't come across the supplemental  
4 disclosure.

5 MR. SCHULMAN: I actually -- the  
6 Court's question is well taken. I actually have a  
7 clean copy of it. But I regret to say that when I  
8 reviewed the copy I received, it was missing page  
9 three. So I had that faxed over the other night from  
10 Weil, Gotshal. If the Court would pardon the  
11 informality --

12 THE COURT: Sure.

13 MR. SCHULMAN: -- I would be happy to  
14 proffer to the Court this document, which is an  
15 integral copy.

16 THE COURT: If we could make a more  
17 beautiful copy a part of the formal record, I think  
18 that would be appropriate.

19 MR. SCHULMAN: Given the exigencies,  
20 I would like to get it in front of the Court today.

21 THE COURT: Sure. But if others are  
22 ever reviewing it --

23 MR. SCHULMAN: Let me just say --

24 THE COURT: This is the supplement.

1 MR. SCHULMAN: That page is page 2  
2 and 3. The entire document actually is the  
3 supplement.

4 THE COURT: Is the supplement --

5 MR. SCHULMAN: It goes into great  
6 detail about WorldTeam. It goes into great detail  
7 about the O'Hara report. It goes on to disclose the  
8 February and May projections and the reasons, in  
9 detail, for the decline in the projections. It's  
10 quite an informative document, in our view, and forms  
11 an integral part of the settlement package.

12 Your Honor, based on this factual  
13 background, I would like to submit that the class  
14 here on a settlement should be approved. The four  
15 named plaintiffs in the Sequeira action have  
16 submitted affidavits in which they testified, among  
17 other things, that they held the shares at the time  
18 of the tender offer and before, and continued to hold  
19 it through the date of the closure of the tender  
20 offer, and therefore, have the same standing as other  
21 class members, the same claims. And clearly, there  
22 is numerosity and commonality. We would submit the  
23 class should be approved under the Prezant decision.

24 Turning to the settlement, we would



1 submit, again, the settlement is eminently fair for a  
2 number of reasons. We break our analysis into two  
3 parts. First we speak of the preliminary injunction,  
4 because this was our area of major leverage. And of  
5 course, we were at risk that we would make a great  
6 effort and the Court, as it often does,  
7 unfortunately, in this situation would find there was  
8 no basis for injunctive relief, even though we had  
9 set forth what admittedly looked like substantial  
10 grounds to begin with. And we continue to believe we  
11 had done so.

12 The defendants' position was the  
13 total mix of information in the disclosure document,  
14 including a filing with the SEC of the Form 13E-3,  
15 which included Bear Stearns' and Lazard's investment  
16 banker books, was sufficient to address the global  
17 situation of this company.

18 To put it another way, their position  
19 was that the contracts, particularly business  
20 transactions that we had identified as  
21 nondisclosures, were either immaterial of themselves  
22 in light of the company's total picture or, more  
23 significantly, had been reflected in the projections.  
24 And those projections were the basis for Bear

1 Stearns' discounted cash flow analysis, which was  
2 disclosed in the tender offer materials from the very  
3 beginning.

4 To the extent we would call upon the  
5 company to present to the shareholders more detailed  
6 information on the projections, they would  
7 undoubtedly have argued this was in the nature of  
8 soft information that they didn't have a duty to  
9 disclose; they disclosed the total picture, and  
10 therefore, they were in conformity with the duty of  
11 candor.

12 These were issues that were not  
13 clear, in my opinion. I think on the merits, we did  
14 have, if not a substantial likelihood of success --  
15 the test -- we had very colorable claims, in my  
16 opinion, and the discovery cutoff at a point in the  
17 middle. I think under the crucible of adversarial  
18 proceedings, we probably could have a very strong  
19 hearing on that, but it was unnecessary because we  
20 did reach what I thought was a settlement that was  
21 better than was available through the injunctive  
22 process.

23 THE COURT: What did you think your  
24 strongest claim was, strongest claim of omission?

1 MR. SCHULMAN: I think that the -- I  
2 think that the strongest claim, in our view, was that  
3 the shareholders didn't really appreciate the 188  
4 licenses, the interaction with the technology, which  
5 put this company in a very path-breaking condition as  
6 far as its entry into the wireless industry was  
7 concerned.

8 And I think the theory would have  
9 been that you can't really understand a projection in  
10 this kind of cutting-edge industry, where multiples  
11 can go through the roof sometimes, without knowing  
12 what the underlying technology of the company is, and  
13 its most significant markets. And the tender offer  
14 materials were bereft of discussion of either of  
15 those matters, or so we claimed.

16 So in our view, those matters,  
17 whether or not they were reflected in the  
18 projections, were quite significant.

19 THE COURT: The licenses were the  
20 licenses that the company successfully obtained at a  
21 modest price --

22 MR. SCHULMAN: Yes.

23 THE COURT: -- at the end of '98?

24 MR. SCHULMAN: Yes. I think also we

1 had questions from a substantive standpoint, which I  
2 think could have become disclosures, as to the nature  
3 and timing of this O'Hara report. While the  
4 subsequent evidence suggested that it was appropriate  
5 and not an issue of suspicion, nonetheless, again  
6 from an adversarial standpoint, one could have  
7 questioned how the special committee could first  
8 reject a price, then be briefed by management, which  
9 had connections with Securicor, and then adopt the  
10 very transaction it had rejected. If this didn't  
11 suggest unfair dealing, it certainly, in our view,  
12 could have been laid out in a way that suggested some  
13 problem from disclosure that should be set out more  
14 clearly. But the defendants would have argued, "Hey,  
15 you learned that from reading the tender offer  
16 material. You knew it as well as we did."

17 At the end of the day, I think the  
18 hard information on the core development of the  
19 company's business were the key points.

20 THE COURT: Did the original  
21 materials indicate that the investment bankers books  
22 were available?

23 MR. SCHULMAN: They did not. I  
24 looked carefully for that. I looked for

1 incorporation by reference of the 13E-3, or some  
2 reference to that. Undoubtedly, they would have  
3 argued they were in the public domain, but -- I  
4 could be in error on this, but I did look carefully a  
5 number of times, and I didn't see either the  
6 projections that underlay the reports or the specific  
7 incorporation by reference of the 13E-3. Again, we  
8 would have had an issue about shareholders access to  
9 that information.

10 This being the case, and because  
11 defendants often argue that it's uncertain what will  
12 be the state of the company and/or the transaction if  
13 if a PI is granted, we felt it was the better part of  
14 valor, particularly on these terms, to settle the  
15 case. We were also affected in this analysis by the  
16 chances of prevailing at trial, which could happen  
17 years down the road, if it was to happen at all.

18 We would simply note in this context  
19 what appeared to be a well-separate, operating  
20 special committee, that had engaged in extensive  
21 negotiations, had received the routine, orthodox  
22 outside advice. There were fairness opinions. The  
23 most significant point I think was Securicor's  
24 argument that this company's plans and projections

1 were all contingent on achieving a substantial  
2 financing; that the projections didn't take account  
3 of the ability to finance; that this company, because  
4 of its developmental nature and lack of cash flows,  
5 didn't have meaningful access to any financing other  
6 than that of Securicor. Securicor had no obligation  
7 under Delaware law to put the company up for sale and  
8 made clear it wasn't interested in extending further  
9 tens of millions of dollars without acquiring all of  
10 the public float.

11 So at the end of the day, this  
12 transaction was almost an all-or-nothing transaction  
13 for the company. And in that context, it would have  
14 been very difficult to establish either that there  
15 was unfair dealing or an unfair price. All the facts  
16 came out through the discovery process, and the  
17 subsequent disclosure materials, suggesting risk at  
18 trial, not with respect to the initial pleading of  
19 the case.

20 THE COURT: What about -- I think you  
21 alleged somewhere that Bear Stearns had a previous  
22 relationship with the company.

23 MR. SCHULMAN: Yeah. The allegation  
24 was that Bear Stearns was retained by the special

1 committee, and then it came out that Bear Stearns was  
2 doing some other work for the company in the terms of  
3 the formulating its projections, which would enmesh  
4 it with interaction with management and the like.

5 But I think their perspective on it was that -- this  
6 was that of the special committee, that Bear Stearns  
7 did this as an outgrowth of the representation of the  
8 special committee, and therefore, any apparent  
9 conflict was very, very thin.

10 THE COURT: They had been working for  
11 the special committee.

12 MR. SCHULMAN: Actually, they were  
13 already working for the special committee. This  
14 became an additional engagement, in our view. They  
15 claimed it was all part of the same engagement.

16 THE COURT: They were refining --  
17 were they part of how the projections got refined for  
18 the O'Hara report?

19 MR. SCHULMAN: In effect, yes. They  
20 did become part of the taking the O'Hara report  
21 projections, working with management and then  
22 refining it. In a sense, they became on both sides  
23 of the same analysis.

24 THE COURT: Yeah. It's a little odd;

1 isn't it?

2 MR. SCHULMAN: Yes, it is. That and  
3 then they changed lawyers in midstream. There was a  
4 change from Manatt Phelps to Gibson, Dunn.

5 But these issues didn't seem be  
6 overwhelmingly strong issues. Perhaps in the light  
7 of further discovery, they might have been. But as  
8 it looks to us right now, they were coloration but  
9 did not really change the complexion of the case,  
10 which is that on a 50/50 basis, probably were not the  
11 favorite in going forward.

12 I think discounting for all the risks  
13 and uncertainty, delay, cost and the like, I can not  
14 see how this \$4.3 million increase on a \$50 million  
15 deal is anything other than fair and reasonable,  
16 although that is my position. It's more for the  
17 Court to decide.

18 THE COURT: You had your own  
19 financial advisor?

20 MR. SCHULMAN: Yes, we did, Triumph  
21 Partners. They looked --

22 THE COURT: What was their conclusion  
23 about the -- where the ultimate price was in terms of  
24 their valuation of the company?



1 MR. SCHULMAN: The enhanced price?  
2 They were comfortable with the enhanced price. They  
3 supported us on the view that the initial price,  
4 which even on their analysis was below the midpoint  
5 of the DCF, was inadequate. And they looked at --  
6 they also looked at comparables.

7 There was a debate here as to whether  
8 or not DCF was the lone analysis that should be  
9 employed or whether comparable companies or  
10 comparable transaction analyses could be used. There  
11 was an implicit debate about which premium you should  
12 use. Was it 30 days before, or did you look at a  
13 year before, or was that a germane analysis?

14 They claimed you could not look at  
15 the company on a comparables basis, because there were  
16 no comparables, yet when they did the DCF analysis,  
17 they used comparables to get discount rates. At the  
18 end of the day, our advisor used a more multifactored  
19 analysis. He backed us up on this. That's why when  
20 we negotiated to increase it, we started out  
21 substantially higher than 2.75.

22 THE COURT: Where did you start out?

23 MR. SCHULMAN: We started out at  
24 around 3.25, which we felt was reasonable in the

1 spirit of compromise and was close to the maximum  
2 price that the special committee demanded in a  
3 context that we understood was an aggressive posture  
4 by them to move the ball a little bit further on the  
5 side of Securicor. We felt it was a responsible  
6 opening proposal that would lead to an increase but  
7 was not so high as to chill the process from the very  
8 beginning. We try to observe that balance when we  
9 are trying to get more money for shareholders. We  
10 try to be responsible in that way.

11 THE COURT: Why do you think the  
12 defendants settled? Why do you think they gave you  
13 the 25 cents or 26 cents?

14 MR. SCHULMAN: I think they were  
15 concerned about the appearance of the O'Hara report.  
16 I think it was a little less than neat and tidy with  
17 respect to Bear Stearns and change of the lawyer. I  
18 think had we gotten into discovery of the CEO, we  
19 might have developed through him some contradictions  
20 between quotations that he made, allegedly, in the  
21 presence of our clients about certain product lines  
22 and their potential impact on the company.

23 THE COURT: When I read the  
24 complaint, there were specific statements attributed

1 to the CEO. That was based on conversations that  
2 your clients had?

3 MR. SCHULMAN: Yes. He would have  
4 had to admit it. It would have caused tension in the  
5 portrayal of the proxy materials, in our view. While  
6 I can't read their minds, and while there are often  
7 business reasons for doing these that I don't  
8 imagine, if we look at it from a purely legal  
9 standpoint those kind of factors, plus the fact that  
10 we were shaking things up with a preliminary  
11 injunction proceeding in the face of a tender offer,  
12 put them under pressure, which is where we want to  
13 put the defendants in a situation like this, provided  
14 we have a good case, which we believed we did. We  
15 were able to generate from the Weil, Gotshal firm a  
16 settlement dynamic, and the result speaks for itself.

17 That being the case, after we  
18 negotiated the settlement, there was, as there often  
19 is in these cases, a separate negotiation as to a  
20 fee. And I say that because it's important that we  
21 point out that that is separate. It doesn't become  
22 part of the dynamic. It's also important to point  
23 out here, in addition to the lack of any objection,  
24 that this was an entirely arm's-length -- maybe two

1 arm's-lengths -- negotiation between myself and  
2 Mr. Radin, my clients and his client. And they have  
3 agreed to pay this amount out of their own pocket.  
4 It results in no diminution on the part of any value  
5 given to any member of the class. While this does  
6 not divest the Court of its discretion, I think it's  
7 important to place it in that context.

8 It's also important to note that not  
9 only is the benefit substantial -- in my experience,  
10 quite a significant percentage benefit increase. I  
11 do a lot of these cases. I don't have what I call an  
12 empirical chart, the type an investment banker would  
13 present to his client. I think it's a very  
14 substantial percentage increase. It was in the face  
15 of the company's public statement that it had drawn a  
16 line in the sand; it wouldn't go any further.

17 The increase is solely attributable  
18 to the litigation efforts of plaintiffs' counsel and  
19 their clients. It is not a shared-benefit case, as  
20 the Court often sees. There is no issue here as to  
21 quantification or responsibility for the benefit.

22 It is in this context that we come to  
23 the Court seeking a 33 percent fee, 33 percent of the  
24 enhanced amount. In support of that, we have urged

1 for the Court's consideration precedents, in this  
2 Court as well as federal courts, approving 33 percent  
3 fees.

4 One analysis that we have drawn was a  
5 comparison to the Amdahl litigation which we had some  
6 involvement with a couple of years ago, but recent  
7 enough for comparison, in which Amdahl was bought out  
8 by its Japanese majority shareholder, and in a much  
9 bigger transaction, many, many hundreds of millions  
10 of dollars. The shareholders again went into  
11 preliminary injunction mode and negotiated a \$28  
12 million increase, which was less than -- around 3  
13 percent of the total merger consideration, then  
14 applied for a fee of -- and were granted a fee of \$7  
15 million, which amounted to a very substantial  
16 multiple of their time, if one looks at things that  
17 way, 25 percent. This is 33 percent.

18 And there has been a suggestion  
19 sometimes in the Delaware cases that a certain logic  
20 of sliding scale is employed. And while this is a  
21 substantial, multimillion dollar settlement in its  
22 own right, I think one could look to bigger  
23 settlements, where bigger fees are awarded on a 25  
24 percent bench mark, and say that supports this

1 number. We have given the Court the benefit of other  
2 decisions in federal court in analogous common fund  
3 cases, where similar fees have been awarded.

4 I would simply add, in addition to  
5 the factors that I mentioned, that we thought we  
6 brought particular skill and expertise to this  
7 matter; that we moved skillfully and swiftly on both  
8 litigation and negotiation fronts at the same time;  
9 that I would note Bear Stearns had five months to  
10 master this material and was receiving a fee of \$3.1  
11 million. We mastered this area in a few weeks, and  
12 we brought to bear significant pressure on the  
13 company and brought about --

14 THE COURT: You didn't even get to do  
15 additional forecasting work.

16 MR. SCHULMAN: That's right.

17 THE COURT: At least I'm not aware.

18 MR. SCHULMAN: We have not been  
19 retained for any other purpose.

20 THE COURT: You and Mr. Radin will  
21 take care of that and bring you on in some case.

22 MR. SCHULMAN: We would be happy to  
23 terminate today. We did invest over 700 hours on the  
24 case. It was done on a fully contingent basis. As

1 is well-known in this Court, the Court of Chancery  
2 does not apply a Lindy-type lodestar analysis. It  
3 does look to the time, does look to the services. It  
4 looks to the reputations of the lawyers involved, and  
5 those on the opposition. I think we stand up nicely  
6 on all those criteria. There is a substantial policy  
7 in this jurisdiction of awarding on the benefit  
8 primarily, and the way that benefit is achieved. I  
9 think that we stand up well.

10 And I would submit that for all these  
11 reasons, the fee is not only within a range of  
12 reasonableness, but reasonable. I think that in this  
13 context, the agreement of sophisticated people,  
14 bargaining at arm's length on this number, on this  
15 record, commends the approval of the fee. I do  
16 submit it, subject to approval of the settlement,  
17 which brings me to my final topic, which is the  
18 unusual so-called special payments.

19 The clients in this case have gone  
20 above and beyond the call of duty. There is  
21 authority in this Court for breaking with the norm  
22 that class plaintiffs do not derive a benefit  
23 different than those of other class members. This is  
24 really a corollary to the common fund doctrine. The

1 Sprague versus Ticonic Bank case may have begun with  
2 a plaintiff or a litigant bringing a common benefit.  
3 Then this became a doctrine that was appropriated by  
4 lawyers.

5 In this case, the Sequeira plaintiffs  
6 had substantial information that was litigable  
7 information, that provided the predicate for a  
8 complaint that, if my analysis is correct, brought  
9 substantial pressure to bear on the defendants, and  
10 but for their input and their determination to  
11 achieve an enhanced result, cash based, we would not  
12 be standing here today with this kind of result, or  
13 maybe any kind of result.

14 They have recited in their papers  
15 they have collectively put in over a hundred hours of  
16 their own time in this matter. I can represent that  
17 at every stage of the negotiations they were actively  
18 involved in back and forth with me, and that the  
19 position of firmness we took with the defendants was  
20 substantially motivated, as it should be, by our  
21 clients.

22 The unusual thing is the information  
23 they brought to bear and the time they spent, which I  
24 think is above the norm. Thus, in this context,



1 having disclosed the matter fully in the notice, and  
2 having received no objection to that treatment, as  
3 well, we would ask that under the precedents of this  
4 Court and the specific record we have made, that  
5 these payments -- which again involve no diminution  
6 to the class but will come solely out of what the  
7 Court awards in the way of fees -- of \$10,000 to each  
8 of the named plaintiffs in the first filed action --  
9 not all the plaintiffs, but these particular  
10 plaintiffs, be approved.

11 That concludes my remarks, Your  
12 Honor. If you have any comments, questions?

13 THE COURT: No. Anything from the  
14 defendants?

15 MR. SCHULMAN: Thank you, Your Honor.

16 THE COURT: Give me five minutes. I  
17 want to -- so that I can be -- review the  
18 supplemental disclosure, and I'll be back.

19 MR. NACHBAR: Your Honor, we do have  
20 the order and final judgment.

21 THE COURT: That would be great.

22 (Recess at 3:35 p.m.)

23 THE COURT: Start with the class  
24 certification. Class certification is appropriate

1 under the Prezant standards. I note the order, I  
2 believe, sets forth the requisite findings, which are  
3 easily satisfied in cases of this nature.

4 Turning to the approval of the  
5 settlement itself, it seems to me fairly obvious that  
6 the settlement confers a substantial benefit on the  
7 class. This was a not an insignificant increase in  
8 the consideration offered to the minority  
9 stockholders over the original Securicor tender offer  
10 of \$2.75 per share. It's also clear that the  
11 increase is solely attributable to the litigation.

12 This is a situation where the special  
13 committee process had already run its course before  
14 the litigation really kicked in and had any effect at  
15 all. And given that the original offer was 2.75, an  
16 increase of 26 cents a share is not a mere trifle in  
17 percentage terms, or in real terms, to the  
18 stockholders. That's a substantial benefit.

19 I've also reviewed the quite detailed  
20 supplemental disclosure, which is, for buffs of this  
21 sort of thing, an interesting document, filled  
22 with -- chock-filled with financial information about  
23 the company, which would be very helpful to a  
24 stockholder determining whether to accept

1 consideration or to seek appraisal. And that  
2 supplemental disclosure also flowed directly out of  
3 the litigation.

4 I think that, you know, given the  
5 standard that needs to be applied here, it's clearly  
6 a reasonable judgment to settle the case on these  
7 terms. The case had been expedited and there was a  
8 potential for an injunction of the transaction, but  
9 really, the injunction of a transaction like this  
10 would probably only result in an order of the Court  
11 requiring disclosure of information largely of the  
12 nature that was obtained by way of the supplemental  
13 disclosure anyway. It's doubtful that much more than  
14 that could have been achieved at the injunctive  
15 stage.

16 And had the case gone to trial, the  
17 plaintiffs would have faced the difficulty of dealing  
18 with the fact that there was a special committee, it  
19 was represented by law firms and investment banks of  
20 the type usually worthy of respect. I understand  
21 there is -- according to the plaintiffs, there was a  
22 little bit more here that would -- more evidence here  
23 that they were in an awkward situation, but they are  
24 advisors of the type that have been found in other

1 cases to reliably and independently advise special  
2 committees.

3           There also appeared to be, based on  
4 the discovery to be taken, objective reasons that  
5 explain some of the drops in the projections. As I  
6 noted at the scheduling conference, the amended  
7 complaint was admirably specific with respect to the  
8 omissions alleged. I didn't really speak to the --  
9 whether the omissions alleged were material, but it  
10 was -- the complaint was very pointed. And discovery  
11 into those factors indicated that they were a lot  
12 less troubling -- that the concerns that the  
13 plaintiffs raised were a lot less troubling,  
14 probably, in reality than the plaintiffs thought when  
15 they first alleged them. But on balance, clearly,  
16 the increase of 26 cents a share and the substantial  
17 supplemental disclosure supports the release that is  
18 being given to the defendants. I approve the  
19 settlement.

20           Similarly, I'm going to approve a fee  
21 in the amount requested. As Mr. Schulman noted, the  
22 primary -- the primary factor that the Court looks to  
23 in awarding a fee is the benefit conferred. And I  
24 do -- it would be hypocritical of me not to note that

1 I do look at the hours worked in cases, because I --  
2 the only way I can get a sense of whether I'm  
3 awarding a windfall sometimes is to look at the  
4 hours. But the primary thing you look at is the  
5 benefit conferred. And here, the fee is coming  
6 entirely out of the defendants' pocket. It doesn't  
7 diminish the 26 cents a share that was obtained for  
8 the class, and it doesn't in any way diminish,  
9 because the class doesn't have to bear the freight,  
10 the benefits of the supplemental disclosure, which  
11 were also obtained on the class's behalf. And  
12 clearly, a motion to expedite was brought. There was  
13 hard-fought negotiations.

14 I don't think, ordinarily --  
15 defendants represented by lawyers of the quality on  
16 the defense side in this case don't ordinarily give  
17 up 26 cents a share on an offer of \$2.75. I think  
18 that speaks well of the effort the plaintiffs'  
19 counsel put in.

20 And so I'm going to award a fee in  
21 the full amount. I also note that in these  
22 situations where the fee is being borne entirely by  
23 the defendants and there seem to be hard fought  
24 negotiations, the Court I think is less inclined to

1 sort of muck around in it. And that is certainly  
2 true for me.

3 And so I'm going to sign the order.  
4 The amount I believe is \$1,432,000.

5 MR. MONHAIT: That's correct, Your  
6 Honor.

7 THE COURT: Also, in reliance on the  
8 prior precedence of allowing special payments of this  
9 type, I think that the affidavit of Mr. Schulman and  
10 of the named plaintiffs fairly supports their request  
11 for the modest payments to -- I believe it's four of  
12 the named plaintiffs. And so I'm going to sign the  
13 order incorporating that provision, as well.

14 I thank you all for your time. If  
15 you could, make sure the supplemental disclosure is  
16 in the record in a more formal way, I would  
17 appreciate it.

18 MR. SCHULMAN: We shall do so, Your  
19 Honor.


20 (Recess at 2:52 p.m.)

21  
22  
23  
24

CERTIFICATE

I, WILLIAM J. DAWSON, Official Court Reporter of the Chancery Court, State of Delaware, do hereby certify that the foregoing pages numbered 3 through 37 contain a true and correct transcription of the proceedings as stenographically reported by me at the hearing in the above cause before the Chancellor of the State of Delaware, on the date therein indicated.

IN WITNESS WHEREOF I have hereunto set my hand at Wilmington, this 10th day of May, 2000.

  
Official Court Reporter  
of the Chancery Court  
State of Delaware

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE  
IN AND FOR NEW CASTLE COUNTY

IN RE INTEK GLOBAL CORPORATION  
SHAREHOLDER LITIGATION

) CONSOLIDATED  
) CIVIL ACTION NO. 17207

**FINAL ORDER AND JUDGMENT**

-The Stipulation of Settlement dated February 29, 2000 (the "Stipulation" or "Settlement") of the above-captioned actions (the "Litigation"), having been presented to the Court at a hearing on April 24, 2000 (the "Settlement Hearing") held pursuant to this Court's Order dated March 7, 2000 (the "Scheduling Order"), the Court having heard and considered evidence in support of the proposed Settlement, and an opportunity to be heard having been given to all persons requesting to be heard in accordance with the Scheduling Order, and the proposed Settlement having been considered by the Court;

IT HEREBY IS ORDERED, ADJUDGED AND DECREED as follows:

1. This Court finds and concludes that class certification is appropriate under Court of Chancery Rules 23(a) and (b) and certifies the Litigation as a class action pursuant to Court of Chancery Rules 23(b)(1) and (b)(2) on behalf of a class (the "Class") consisting of all persons other than defendants and their affiliates who owned shares of common stock of Intek Global Corporation ("Intek") on January 19, 1999, and their successors in interest and transferees, immediate and remote, through and including the completion of a tender offer on August 17, 1999 by Security Services plc ("Security Services"), a wholly-owned subsidiary of Securicor plc ("Securicor"), for any and all shares of Intek at a price of \$3.0125 per share (the "Tender Offer"), and the closing of a second-step cash-out merger on August 25, 1999, pursuant



to which Security Services acquired all shares of Intek that Securicor (or Security Services) did not already own at a price of \$3.0125 per share (the "Merger"). This Court finds that (i) the Class is so numerous that joinder of all members is impracticable, (ii) there are questions of law and fact common to the Class, (iii) plaintiffs' claims are typical of the claims of the Class, and (iv) plaintiffs and their counsel have fairly and adequately protected the interests of the Class.

2. This Court certifies plaintiffs as class representatives and plaintiffs' counsel as class counsel.

3. This Court finds and concludes that notice was given to members of the Class in compliance with the Court's Scheduling Order.

4. This Court finds and concludes, with respect to both the form of the notice given and the procedure used to give notice, that the notice given is the best notice reasonably practicable under the circumstances and fully satisfies the requirements of Court of Chancery Rule 23, the Constitution of the United States and any other applicable law.

5. This Court finds and concludes that the Settlement, pursuant to which the price offered for shares of common stock of Intek was increased from \$2.75 per share to \$3.0125 per share, with payment to each stockholder rounded to the nearest cent, in the Tender Offer and in the Merger, and pursuant to which the parties' counsel conferred in good faith concerning defendants' disclosure of material information in connection with the Tender Offer, and defendants made mutually agreed upon supplemental disclosures in connection with the Tender Offer and the Merger, is fair, reasonable, adequate and in the best interests of the Class, and this Court approves the Settlement.

6. The Effective Date of the Settlement shall be ten days following the later of the following events: (i) if there is not an appeal or appeals, other than an appeal or appeals

solely with respect to attorneys' fees and reimbursement of expenses, the date upon which the time expires for filing or noticing any appeal of the Final Order and Judgment (as defined below) other than an appeal solely with respect to attorneys' fees and reimbursement of expenses awarded pursuant to the terms of this Stipulation and (ii) if there is an appeal or appeals, other than an appeal or appeals solely with respect to attorneys' fees and reimbursement of expenses, the completion, in a manner that affirms and leaves in place the Final Order and Judgment, of all proceedings arising out of the appeal or appeals (including, but not limited to, the expiration of all deadlines for motions for reconsideration or rehearing or petitions for certiorari, all proceedings ordered on remand, and all proceedings arising out of any subsequent appeal or appeals following decisions on remand).

7. Upon the Effective Date, the following parties will be released (the "Released Parties") with respect to the Released Claims (as defined below): Defendants and their present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employees, agents, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other advisors, investment bankers, underwriters, lenders, and any other representatives of any of these persons or entities.

8. Upon the Effective Date, the following claims will be released (the "Released Claims") with respect to the Released Parties: All claims and rights, whether known or unknown, belonging to any or all plaintiffs and any or all members of the Class and their present or past heirs, executors, estates, administrators, predecessors, successors, assigns, parents, subsidiaries, associates, affiliates, employees, agents, insurers, directors, managing directors, officers, partners, principals, members, attorneys, accountants, financial and other

advisors, investment bankers, underwriters, lenders and any other representatives of any of these persons and entities, including, without limitation, any claims, whether direct, derivative, representative or in any other capacity, arising under federal, state, local, statutory or common law or any other law, rule or regulation, including the law of any jurisdiction other than the United States, that relate in any way to (i) any allegation or claim that any action by any of the Released Parties, or any failure of any of the Released Parties to take any action, affected the price of Intek's stock, (ii) the acquisition or ownership of equity securities of Intek or any affiliate of Intek by Securicor or any of the Released Parties, (iii) loans made to Intek or any affiliates of Intek by Securicor or any of the Released Parties, (iv) the fiduciary duties of any of the Released Parties to holders of Intek stock, (v) the January 19, 1999 Announcement, (vi) the Tender Offer, (vii) the Merger, (viii) the negotiation, consideration or formulation of the Tender Offer or the Merger, (ix) the disclosure obligations of any of the Released Parties in connection with the Tender Offer or the Merger, or (x) any other claim, other than claims for appraisal of shares pursuant to 8 Del. C. § 262, relating in any way to the Litigation or any of the subjects listed in items (i) through (ix) above.

9. The term "unknown" in the definition of the Released Claims includes claims that any or all Plaintiffs or members of the Class do not know or suspect to exist, which, if known by him, her or it, might affect his, her or its agreement to release the Released Parties and the Released Claims, or might affect his, her or its decision to object or not to object to the Settlement. Upon the Effective Date, Plaintiffs and members of the Class shall be deemed to have, and by operation of the Final Order and Judgment in the Litigation shall have, expressly waived and relinquished, to the fullest extent permitted by law, the provisions, rights and benefits of § 1542 of the California Civil Code, which provides as follows:

A general release does not extend to claims, which the creditor does not know or suspect to exist in his favor at the time of executing the release, which if known by him must have materially affected his settlement with the debtor.

Upon the Effective Date, Plaintiffs and the Class also shall be deemed to have, and by operation of the Final Order and Judgment shall have, waived any and all provisions, rights and benefits conferred by any law of any state or territory of the United States, or principle of common law, or the law of any jurisdiction other than the United States, which is similar, comparable or equivalent to § 1542 of the California Civil Code. Plaintiffs, on behalf of the Class, acknowledge that members of the Class may discover facts in addition to or different from those that they now know or believe to be true with respect to the subject matter of this release, but that it is their intention, on behalf of the Class, fully, finally and forever to settle and release the Settled Claims, including unknown claims, as that term is defined in this Paragraph.

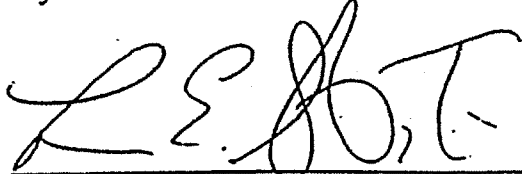
10. Plaintiffs and members of the Class are permanently enjoined from commencing or prosecuting, either directly or indirectly, any action in any court asserting any of the Settled Claims.

11. The Litigation is dismissed with prejudice and without costs except as provided for in this Stipulation and the Final Order and Judgment.

12. Attorneys' fees and reimbursement of expenses (including, but not limited to, fees of plaintiffs' financial advisor and industry advisor) are awarded in the amount of \$ 1,432,000. Plaintiffs' counsel are permitted to pay \$10,000 of the amount awarded by the Court as a special payment to each of plaintiffs Richard F. Sequeria, Kenneth J. Anderson, James E. Ryan and William Goodwin (a total of \$40,000). The firm Milberg Weiss Bershad Hynes & Leach LLP has the sole authority to determine the allocation of attorneys' fees between and

among plaintiffs' counsel based upon their respective services rendered and contributions to the outcome of the Litigation.

13. The Register in Chancery is directed to enter and docket this Final Order and Judgment.

  
\_\_\_\_\_  
Vice Chancellor

Date: April 24, 2000

166760

**TAB 4**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:COMMERCIAL DIVISION

-----X  
ARNOLD WANDEL, Derivatively on Behalf of  
Nominal Defendant BED BATH & BEYOND INC.,

Plaintiff,

Index No. 603665/06

-against-

WARREN EISENBERG, LEONARD FEINSTEIN,  
STEVEN H. TEMARES, ARTHUR STARK,  
MATTHEW FIORILLI, RONALD CURWIN,  
EUGENE CASTAGNA, ROBERT S. KAPLAN,  
DEAN ADLER, VICTORIA MORRISON, FRAN  
STOLLER, KLAUS EPPLER, STEVEN [sic]  
BARSHAY, JORDAN HELLER, and ESTATE  
OF ROBERT J. SWARTZ,

Defendants,

BED BATH & BEYOND INC.,

Nominal Defendant.

-----X

Charles Edward Ramos, J.S.C.:

Defendants, officers and current/former members of the board of directors of Bed Bath and Beyond Inc. ("BBB"), move pursuant to CPLR 3211 (a)(1), 3211(a)(7), and Business Corporation Law ("BCL") § 626(c), to dismiss the Amended Complaint of plaintiff, Arnold Wandel, suing derivatively on behalf of nominal defendant BBB.

#### Background

On January 4, 2007, plaintiff filed an Amended Complaint against the board of directors<sup>1</sup> and officers<sup>2</sup> of BBB seeking

---

<sup>1</sup> Defendants on the board of directors of BBB are as follows: Robert S. Kaplan, Dean Adler, Victoria Morrison, Fran Stoller, Klaus Eppler, Steven [sic] Barshay, Jordan Heller, Robert J. Swartz (deceased 2001).

<sup>2</sup> Defendants that are officers of BBB are as follows: Arthur Stark, Matthew Fiorilli, Ronald Curwin, Eugene Castagna, Warren Eisenberg, Leonard Feinstein, Steven H. Tamares.

**FILED**  
MAY 18 2007  
NEW YORK  
COUNTY CLERKS OFFICE

damages for alleged violations of fiduciary duties, unjust enrichment, gross mismanagement, and corporate waste.

The complaint alleges that the named defendants are liable to BBB for taking part in a stock option backdating scheme, that allowed Eisenberg, Feinstein, and Tamares to attain higher values on their stock options by changing the exercise price (the purchase price of the stock on the date issued), to a more financially advantageous date (with a lesser exercise price) in order to make gains after it is known that the stock price had risen. This scheme is alleged to have occurred over the past 14 years costing BBB millions of dollars.

On June 5, 2006, Merrill Lynch issued a report that included BBB on a list of companies that showed increases in share trading prices subsequent to stock option grant dates. A similar report was issued by Deutsche Bank on June 14, 2006. On June 19, 2006, the Board appointed an "independent special committee"<sup>3</sup> ("Special Committee") to investigate the matter. On June 20, 2006, the committee retained the firm of Weil, Gotshal & Manges, LLP ("Weil Gotshal") as independent legal counsel to conduct an investigation. On June 25, 2006, Weil Gotshal engaged Navigant Consulting, Inc. to serve as independent accounting experts. After an extensive investigation, the Special Committee generated a detailed report. The report confirmed evidence of backdating of options, however backdating was deemed to have been

---

<sup>3</sup> The Committee was comprised of defendants, Jordan Heller and Steven Barshay.



unintentional. On September 20, 2006, BBB voluntarily reported its findings to the Securities Exchange Commission ("SEC"). On October 10, 2006, BBB made the report public.

Based on the review of the report, the Special Committee recommended that the Company reform its policy with regard to stock option grants by adopting a number of new controls. BBB adopted the recommended reforms. Additionally, BBB is revising the dates of certain option grants, pursuant to applicable accounting principles. BBB has determined through a financial analysis, that there were no material changes to its financial condition in any relevant period. Therefore, BBB need not restate its historical financial statements. However, BBB will record an adjustment of approximately \$65 million in the equity section of its consolidated balance sheet for the fiscal year ending March 3, 2007. This adjustment will cover the aggregate of "non-material" charges in the prior fourteen years. BBB will also record a \$7.2 million charge in its third quarter income statement covering the first three quarters of the current fiscal year.

In December 2006, BBB reset the price of all unvested options, increasing the exercise price on the dates the Special Committee had determined to be the appropriate measurement dates. Due to this adjustment affecting not only executives, but lower-level employees as well, BBB has agreed to repay the price differential to the latter. The executives will not receive such repayment.

### Legal Standards

When assessing the adequacy of a complaint on a motion to dismiss pursuant to CPLR 3211(a)(7), a court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide the plaintiff "the benefit of every possible favorable inference." *Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Whether a plaintiff can ultimately prove its allegations is not part of the calculus in determining a motion to dismiss. *Id.* The motion must be denied if from the pleadings' four corners "factual allegations are discerned which taken together manifest any cause of action cognizable at law." 511 W. 232<sup>nd</sup> *Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002), quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977).

"Dismissal under CPLR 3211(a)(1) is warranted 'only if the documentary evidence submitted conclusively established a defense to the asserted claims as a matter of law.'" *Id.*, quoting *Leon supra* at 88.

BCL § 626(c) provides that in a shareholders' derivative action "the complaint shall set forth with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such effort."

### Discussion

As a preliminary matter, in opposing defendants' motion to dismiss, plaintiff does not address any of the remedial actions that BBB has undertaken in response to the Special Committee's recommendations as well as the monetary adjustments made to stock

option grants. Nor does plaintiff address or argue any possible inadequacy of the remedial actions. BBB's voluntary actions could render plaintiff's complaint moot.

In any event, defendants' motion to dismiss the Amended Complaint is granted because plaintiff failed to make a demand on the Board, and board futility was not pled with particularity in accord with BCL § 626(c).

Generally:

"the demand requirement rests on basic principles of corporate control--that the management of the corporation is entrusted to its board of directors who have primary responsibility for acting in the name of the corporation and who are often in a position to correct alleged abuses without resort to the courts. The demand requirement thus relieves courts of unduly intruding into matters of corporate governance by first allowing the directors themselves to address the alleged abuses." *Bansbach v Zinn*, 1 NY3d 1,8 (2003) (internal citation omitted).

A demand by a shareholder that the corporation initiate an action would be futile if a complaint alleges with particularity that (1) a majority of the directors are interested in the transaction, (2) the directors failed to inform themselves to a degree reasonably necessary about the transaction, or (3) the directors failed to exercise their business judgment in approving the transaction. *Marx v Akers*, 88 NY2d 189, 198 (1996).

Defendants correctly contend that plaintiff failed to make a demand on the Board of Directors and failed to allege with particularity that such a demand would have been futile.

Paragraphs 60, 61, 63 of the Amended Complaint set forth the plaintiff's reasoning why a demand on the Board would have been futile.

60. "...demand would be futile and useless act because the Board is incapable of making an independent and disinterested decision to institute and vigorously prosecute the action."
61. (b) "...as members of the Stock Option Committee, they directly participated in and approved the misconduct alleged herein and are substantially likely to be held liable for breaching their fiduciary duties...Moreover, by colluding with Officer Defendants...(they) have demonstrated that they are unable or unwilling to act independently..."
- (c) "...as a [sic] members of the Compensation Committee, they directly participated in and approved the misconduct alleged herein and are substantially likely to be held liable for breaching their fiduciary duties...Moreover, by colluding with Officer Defendants...(they) have demonstrated that they are unable or unwilling to act independently..."
- (d) "...as members of the Audit Committee they directly participated in and approved the misconduct alleged herein and are substantially likely to be held liable for breaching fiduciary duties...Moreover, by colluding with the Officer Defendants...(they) have demonstrated that they are unable or unwilling to act independently..."
- (e) "...as directors of the Company, they directly participated in and approved the filing of false financial statements and other SEC filings...Moreover, by colluding with the Officer Defendants and others...(they) have demonstrated that they are unable or unwilling to act independently..."
63. "Furthermore, demand is excused because the misconduct complained of herein was not, and could not have been, an exercise of good faith business judgment."

As the Court of Appeals held in *Marx supra*, "It is not sufficient, in a shareholder's derivative action, merely to name a majority of the directors as parties defendant with conclusory allegations of wrongdoing or control by wrongdoers to justify failure to make a demand." *Id* at 199-200. "The statute requires that the complaint shall set forth with particularity the reasons

for not making such effort." Id.

It is undisputed that the three directors (Eisenberg, Feinstein, and Tamares) that personally benefitted from backdating stock options are "interested" in the transaction. However, what is lacking in plaintiff's allegations is why the seven other directors were interested in the backdating of stock options. As Marx instructs, conclusory allegations as to director control or wrongdoing is insufficient to satisfy BCL § 626 particularity requirement. The mere presence of directors on committees is not particular as to their individual participation or alleged collusion with interested directors in the backdating of stock options.

Furthermore, with regard to demand futility, the Amended Complaint is deficient as to how the directors allegedly failed to inform themselves to a degree reasonably necessary about the transaction, or how directors allegedly failed to exercise their business judgment in approving the transaction.

As to the former, the complaint is completely silent on the directors' failure to keep fully informed. As to the latter, although paragraph 63 above, is on point, this broad conclusory allegation is patently insufficient to pass muster under BCL § 626. "Demand is excused because of futility when a complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors." Marx at 200. The complaint fails to address any egregiousness act in support of

demand futility.

Accordingly,

It is ORDERED, that defendants' motion to dismiss the Amended Complaint is hereby granted.

Dated: May 3, 2007



J.S.C.  
HON. CHARLES E. RAMOS

Counsel are hereby directed to obtain an accurate copy of this Court's opinion from the record room and not to rely on decisions obtained from the internet which have been altered in the scanning process.

**FILED**  
MAY 18 2007  
NEW YORK  
COUNTY CLERK'S OFFICE